

# **Exhibit 9**

County of the State of New York  
First Department

Aaron Frosch, Executor of the  
Estate of Marilyn Monroe,

Plaintiff-  
Appellant,

New York County  
Index No. 01527/75

-against-

Grosset & Dunlap, Inc., Alskog, Inc.,  
Norman Mailer, Lawrence Schiller and  
Allen Hurst,

Defendants-  
Respondents.

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Reply Brief of Plaintiff-Appellant  
Aaron Frosch

Preliminary Statement  
in Reply

The briefs submitted by respondents attempt to reassert their motion to dismiss below along several novel lines never presented to the Special Term, and to obfuscate this Appellate Court's review of the single and erroneous determination upon which their motion was granted.

The expansive dissertation on the law of privacy offered by Remar & Curtis cloaks the simple issue raised on this appeal - - whether or not the conclusive characterization of Marilyn as a privileged biography is determinable as a matter of law on a motion or whether this critical question of fact should be tried to a jury.

No other issues are presently before the Appellate Division because the existence of the appropriated right of publicity of decedent Marilyn Monroe and its descendibility to her estate were tacitly and explicitly conceded by all respondents and the Court below. As far as this appeal is concerned, the existence and descendibility of the right of publicity, and its possession by the Monroe Estate, are uncontroverted conclusions of law upon which respondents' motion was granted, and which cannot now be contested by them.

Moreover, even if the existence and descendibility of the right of publicity was in issue, the prevailing law is abundantly clear that such a right exists in New York and is descendible to a decedent's legal designees.

Finally, the right of publicity is the only right underlying plaintiff's claim. Respondents' attempts on this appeal to recast plaintiff's claim into some other legal pigeon hole is a transparent attempt to divert this Appellate Court from the single issue before it.

#### Argument

##### Point I.

The Existence of a Right of Publicity in New York, its Descendibility and its Possession by the Estate of Marilyn Monroe are Uncontroverted Conclusions of Law not at Issue on this Appeal

In their moving memorandum below (joined in by all respondents on this appeal, A-78, A-83), Rembar & Curtis, quoting from Factors Etc., Inc. v. Pro Arts, Inc. 579 F.2d 215, 221-222 (2d Cir. 1978),

state that:

"There appears to be no logical reason to terminate this [right of publicity] upon death of the person protected. ' "

[Rembar & Curtis Moving Memorandum at p.21]

While attempting, by way of a footnote (at page 21 of their moving memorandum, to disavow any concession on this point, Rembar & Curtis nevertheless reiterate (at page 5 of their Reply Memorandum below) that the right of publicity's descendibility has "been conceded for purposes of this motion" [emphasis supplied]. Additionally, following a voluminous dissertation on the relationship between the right of publicity and New York's statutory right of privacy, Rembar & Curtis state:

"However, for purposes of this motion (and only for purposes of this motion) it will be assumed that a common-law right of publicity would be recognized in New York." [Rembar & Curtis Moving Memorandum at p.5]

Continuing, Rembar & Curtis add that:

"The supposed common-law right of publicity recognized in Federal cases, is assignable and may be descendible at least in certain circumstances. See Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2nd Cir. 1978); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975)." [Rembar & Curtis Moving Memorandum at p. 6].

For purposes of the motion below, Rembar & Curtis clearly joined in plaintiff's contention that the right of publicity exists



and is descendible\*, for the purpose of pitching their motion to  
dismiss on one and only one argument, predicated on the existence  
of the right of publicity and its possession by the Monroe Estate.

As Rembar & Curtis argued below:

"[E]ven if such a common-law  
right of publicity exists in New  
York and is descendible, it cannot  
and does not preclude the publication  
of a biography such as the book in-  
volved in this case . . . this  
principle is fully established and  
fully disposes of plaintiff's claim."  
[Rembar & Curtis Moving Memorandum  
at p. 6, joined in by respondents  
in their respective Memoranda below]

The entire and exclusive thrust of the motion to dismiss,  
as stated by Rembar & Curtis below was that:

"[Plaintiff's] entire action is  
useless because the law is perfectly  
clear that the publication of a biography  
in no way violates the subject's right of  
publicity or any other right. This is  
true even during the subject's life, and  
certainly true where, as here, a biography  
is published years after the subject's  
death." [A-47, emphasis supplied]

\* \* \*

No right of Marilyn Monroe's estate is  
infringed by the publication of one  
(or a multitude) of biographies."  
[A-48-49, emphasis supplied]

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\*Even if no concession on this point was made below, the prevailing  
law, largely shaped by the Federal courts' interpretation of New York  
law, upholds the right of publicity and the principle of descendibility.  
See, Appellant's Brief at pps. 6-9

Accordingly, this Court is presented with no issue other than that relied upon exclusively by respondents in obtaining the dismissal below -- the characterization of Marilyn as a biography. The law is clear that no other issue may be belatedly raised on this appeal, Shapiro v. City of New York, 32 N.Y.2d 96, 102, 343 N.Y.S.2d 323, 327 (1973); Anselmo v. Bush Universal Inc., 58 A.D.2d 635, 396 N.Y.S.2d 38 (2d Dept. 1977); Balen Developing Corp. v. American Home Assurance Co., 54 A.D.2d 953, 388 N.Y.S.2d 630 (2d Dept. 1976), and all other issues now raised for the first time by Rembar & Curtis must be disregarded.

#### Point II.

Whether or Not a Work is Beyond the  
Reach of the Right of Publicity because  
it is Claimed to be a Privileged Biography  
is a Question of Fact for Jury Resolution

Here, as in the motion below, Rembar & Curtis have attempted to cast plaintiff's claim into various theoretical pigeon-holes, which, when applied to the facts at bar, and after lengthy analysis, result in the demise of each theory. However, Judge Greenfield had no difficulty in piercing this obfuscation, simply and correctly describing plaintiff's claim as follows:

"The gravamen of plaintiff's claim is that a book written by Norman Mailer entitled 'Marilyn' is not a biography, but rather a product put together for sale and profit in book form to effect a conversion and wrongful



exploitation and appropriation of the  
rights of publicity possessed by  
decedent, and now her estate."  
[A-12]

Judge Greenfield summarily concluded that Marilyn was  
a privileged biography, and it is solely the propriety of this  
determination which this Court is asked to review. As indicated  
in our earlier brief on appeal, summary judgment on Marilyn's  
characterization should have been denied because at the very  
least it presents a triable issue of fact. (Brief for Plaintiff-  
Appellant at pps. 12-13). Respondents' interpretations of the  
author's text do not give rise to an unassailable conclusion  
that Marilyn is biographical as a matter of law. (Brief for  
Plaintiff-Appellant at pps. 13-14). Rather, as indicated in our  
earlier brief, Marilyn is a hybrid work of fact and fiction  
whose characterization cannot be made by simple reference to  
traditional definitions of biography, and the law requires  
that respondents' interpretations should properly be argued  
to a jury.

#### Conclusion

For the foregoing reasons, this Appellate Court should  
properly limit its review to the single issue raised below, and  
reverse the erroneous summary conclusion of Special Term that  
Marilyn is a biography as a matter of law. At the very least,

...question should be submitted to a jury for final resolution following a review of all relevant facts.

Respectfully submitted,

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